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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 IN RE FACEBOOK BIOMETRIC
13 INFORMATION PRIVACY LITIGATION

14
15 THIS DOCUMENT RELATES TO:
16 ALL ACTIONS

17
18 FREDERICK WILLIAM GULLEN, on behalf
of himself and all others similarly situated,

19 Plaintiff,

20 v.

21 FACEBOOK, INC.,

22 Defendant.
23
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**UNOPPOSED OMNIBUS
ADMINISTRATIVE MOTION TO FILE
UNDER SEAL**

Master Docket No.: 3:15-CV-03747-JD

*[Declaration of John Nadolenco and
Proposed Order filed concurrently herewith]*

Case No. 3:16-cv-00937-JD

Pursuant to Civil Local Rules 7-11 and 79-5, the Stipulated Protective Order in this action (Dkt. 55), the Court's Standing Order for Civil Cases, and the Court's January 2, 2018 and February 2, 2018 orders (Dkt. 123; Dkt. 133), defendant Facebook, Inc. ("Facebook") files this unopposed omnibus administrative motion to maintain under seal certain documents filed in connection with the following motions: plaintiffs' motions for class certification (*Facebook Biometric* Dkt. 255 and *Gullen* Dkt. 108), Facebook's motion for summary judgment (*Facebook Biometric* Dkt. 257 and *Gullen* Dkt. 105), and plaintiff Gullen's motion for leave to file a first amended complaint (*Gullen* Dkt. 129).¹

Counsel for plaintiffs Nimesh Patel, Adam Pezen, Carlo Licata, and Frederick William Gullen ("plaintiffs") have indicated that they do not oppose any of the sealing requests that are subject to this motion. Further, Facebook understands that plaintiffs will not seek to maintain under seal any materials designated as "Confidential" by plaintiffs that were filed provisionally under seal by Facebook. *See* Declaration of John Nadolenco in Support of the Unopposed Omnibus Administrative Motion to Seal ("Nadolenco Sealing Decl.") ¶¶ 8, 24. Accordingly, these materials may be unsealed, as further delineated below.

The Nadolenco Sealing Declaration, filed concurrently with this motion, identifies the documents that Facebook seeks to maintain under seal and the bases for sealing. In accordance with Paragraph 28 of the Court's Standing Order and Local Rule 79-5(d)(1), redacted and unredacted versions of the documents that Facebook seeks to maintain partially under seal are attached to this motion if those documents differ from the versions that were submitted provisionally under seal in connection with the filings subject to this omnibus motion.² Facebook also submits herewith separate proposed orders for *In re Facebook Biometric*

¹ Neither party requests that the court maintain under seal any documents filed in connection with Facebook's renewed motion to dismiss (*Facebook Biometric* Dkt. 227 and *Gullen* Dkt. 93).

² Specifically, the documents attached hereto fall into two categories: (1) documents filed by plaintiffs, for which Facebook seeks more narrow sealing than as originally filed; and (2) briefs filed by Facebook that had included provisionally redacted references to the deposition transcripts of the named plaintiffs, which plaintiffs now do not request to maintain under seal.

1 *Information Privacy Litigation* and *Gullen v. Facebook, Inc.* in the tabular format required by
 2 Local Rule 79-5(d)(1)(B) that include the reasons for sealing the material outlined below.

3 **I. LEGAL STANDARD**

4 Filings under seal are “the primary means by which the courts ensure full disclosure of
 5 relevant information, while still preserving the parties’ (and third parties’) legitimate expectation
 6 that confidential business information, proprietary technology and trade secrets will not be
 7 publicly disseminated.” *In re Adobe Sys., Inc., Sec. Litig.*, 141 F.R.D. 155, 161-62 (N.D. Cal.
 8 1992). One of two standards applies depending upon whether the document is filed in
 9 connection with a dispositive or non-dispositive motion.

10 Where a “sealed discovery document [is attached] to a non-dispositive motion,” the
 11 “usual presumption of the public’s right of access is rebutted.” *Kamakana v. City & Cnty. of*
 12 *Honolulu*, 447 F.3d 1172, 1179-80 (9th Cir. 2006) (quoting *Phillips v. General Motors Corp.*,
 13 307 F.3d 1206, 1213 (9th Cir. 2002)); see *In re Yahoo Mail Litig.*, 2015 WL 12990210, at *1
 14 (N.D. Cal. June 8, 2015) (motion for class certification is a non-dispositive motion). Under these
 15 circumstances, a particularized showing of “good cause” under Federal Rule of Civil Procedure
 16 26(c) will suffice to maintain the information under seal. *Id.* at 1180 (citing *Foltz v. State Farm*
 17 *Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). The party must simply show that
 18 “specific prejudice or harm will result” from disclosure of the information. *Phillips ex rel.*
 19 *Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002); see *CreAgri, Inc.*
 20 *v. Pinnaclife Inc.*, 2014 WL 27028, at *2 (N.D. Cal. Jan. 2, 2014) (granting motion to seal
 21 portion of document that would “not further the public’s understanding of the reasoning
 22 underlying the Court’s decisions” when there was “some interest . . . in maintaining the
 23 confidentiality” of the sealed material).

24 In comparison, a party seeking to seal dispositive motion papers must show that the
 25 motion to seal is supported by “compelling reasons.” *Kamakana*, 447 F.3d at 1179. Under the
 26 heightened standard, “[t]he protection of proprietary business information and prospective
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business plans is a compelling reason to permit the filing of documents under seal.” *Morawski v. Lightstorm Entm’t, Inc.*, 2013 WL 12122289, at *2 (C.D. Cal. Jan. 14, 2013); *Bauer Bros. LLC v. Nike, Inc.*, 2012 WL 1899838, *2 (S.D. Cal. May 24, 2012) (same). “Where a party shows that its documents contain sources of business information that might harm its competitive standing, the need for public access to the records is lessened.” *Algarin v. Maybelline, LLC*, 2014 WL 690410, at *3 (S.D. Cal. Feb. 21, 2014) (granting motion to seal under “compelling reasons” standard). A court may order the sealing of records under the compelling reasons standard when they contain sensitive business information, such as trade secrets. *Herron v. Best Buy Stores, LP*, 2015 WL 5330271, at *3 (E.D. Cal. Sept. 10, 2015); *Rich v. Shrader*, 2013 WL 6190895, at *2 (S.D. Cal. Nov. 26, 2013). This type of information is regularly sealed. *See Apple, Inc. v. Samsung Elecs. Co.*, 2013 WL 3855529, at *2 (N.D. Cal. July 24, 2013) (permitting the sealing of proprietary data and noting that the potential competitive harm outweighed the public’s interest in accessing raw data).

The sealing requests associated with Facebook’s motion for summary judgment are evaluated under the heightened compelling reasons standard. In comparison, the sealing requests associated with plaintiffs’ motions for class certification and plaintiff Gullen’s motion for leave to file a first amended complaint are evaluated under the good-cause standard.

II. REQUESTS TO SEAL

Generally, the information that Facebook seeks to seal contains either confidential and commercially sensitive information about Facebook’s network architecture and Facebook’s facial-recognition technology, or confidential personal information. Such information has been produced and designated by Facebook as either “Confidential,” “Highly Confidential – Attorneys’ Eyes Only” or “Highly Confidential – Source Code” under the Protective Order entered in this case. *See* Nadolenco Sealing Decl. ¶ 4.

1 **A. Facebook’s Motion For Summary Judgment**

2 **1. Portions Of The Yadan Declaration**

3 Facebook requests to seal confidential information contained in the redacted portions of
 4 the Declaration of Omry Yadan in Support of Facebook’s Motion for Summary Judgment
 5 (“Yadan Declaration”). *Facebook Biometric* Dkt. 257-9, *Gullen* Dkt. 105-9. Omry Yadan is a
 6 software engineer with extensive knowledge about Facebook’s network architecture and
 7 Facebook’s facial-recognition technology. The Yadan Declaration discusses trade secrets and
 8 commercially sensitive information, the disclosure of which would cause Facebook competitive
 9 harm. “A trade secret may consist of any formula, pattern, device or compilation of information
 10 which is used in one’s business, and which gives him an opportunity to obtain an advantage over
 11 competitors who do not know or use it.” *In re Elec. Arts, Inc.*, 298 F. App’x 568, 569 (9th Cir.
 12 2008) (internal citations and quotations omitted). “One factor that weighs in favor of sealing
 13 documents is when the release of the documents will cause competitive harm to a business.”
 14 *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013); *see also Nat’l Labor*
 15 *Relations v. CEMEX, Inc.*, 2009 WL 5184695, at *2 (D. Ariz. Dec. 22, 2009), *as amended* (Feb.
 16 1, 2010); *Morawski v. Lightstorm Entm’t, Inc.*, 2013 WL 12122289, at *2 (C.D. Cal. Jan. 14,
 17 2013) (“The protection of proprietary business information . . . is a compelling reason to permit
 18 the filing of documents under seal”).

19 In his declaration, Mr. Yadan addresses Facebook’s network architecture and the way in
 20 which those systems interact with and support Facebook’s facial-recognition technology. Mr.
 21 Yadan also describes how Facebook’s facial-recognition technology works, and how that
 22 technology is applied to photographs uploaded to Facebook. Facebook has designated this
 23 information “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” under the
 24 Protective Order. Nadolenco Sealing Decl. ¶ 9. Moreover, Facebook has otherwise maintained
 25 this sealed information as confidential and has safeguarded this information from public
 26 disclosure. *See* Yadan Decl. ¶ 34. Its public release would cause Facebook harm by providing
 27 competitors—particularly those who also use facial recognition—with insight into how
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Facebook designs its computer systems and its proprietary facial-recognition technology. *Id.* Further, public disclosure of information related to Facebook’s network architecture and how its architecture is used in connection with facial recognition could put Facebook and the people who use Facebook at increased risk of cyber attack by malicious actors. *Id.* For these reasons, among others, Facebook takes steps to ensure that the information set forth in the Yadan Declaration is not disclosed to competitors or otherwise made publicly known. *Id.* Thus, the requested portions of the Yadan Declaration should be maintained under seal.

2. Certain Exhibits To The Yadan Declaration

Facebook also seeks to seal Exhibits 2, 3, 4, 5, and 6 to the Yadan Declaration. Exhibit 2 to the Yadan Declaration contains the names and Facebook user IDs associated with individuals who are not parties to this lawsuit and have not consented to the public disclosure of their personal information related to their use of Facebook. Yadan Decl. ¶ 29; Nadolenco Sealing Decl. ¶ 9. Facebook considers the information contained in Exhibit 2 that identifies Facebook users and their activities on Facebook to be non-public information, and takes steps to prevent such information from becoming publicly available or available to people outside of Facebook. Yadan Decl. ¶ 29; Nadolenco Sealing Decl. ¶ 9. Thus, Exhibit 2 to the Yadan Declaration should remain under seal.

Exhibit 3 to the Yadan Declaration contains confidential information related to both (a) the network architecture of Facebook’s computer systems, and (b) the way in which those systems interact with and support Facebook’s facial-recognition technology. Yadan Decl. ¶ 35(a). Exhibit 4 to the Yadan Declaration contains confidential information regarding research and development work being performed by Facebook’s Applied Machine Learning (“AML”) team. *Id.* ¶ 35(b). Exhibit 5 to the Yadan Declaration references details about Facebook’s image processing system that are considered proprietary and confidential. *Id.* ¶ 35(c). Exhibit 6 to the Yadan Declaration references details about Facebook’s photo tagging system that are considered proprietary and confidential. *Id.* ¶ 35(d). Facebook has maintained this information as

1 confidential and has safeguarded this information from public disclosure. *See* Yadan Decl. ¶ 34;
2 Nadolenco Sealing Decl. ¶ 11. Accordingly, Exhibits 3, 4, 5, and 6 to the Yadan Declaration
3 should remain under seal.

4 **3. Excerpts From The Taigman And Yadan Depositions**

5 Facebook's motion for summary judgment also attached excerpts from the deposition
6 transcripts of Facebook witnesses Yaniv Taigman and Omry Yadan. Mr. Taigman and Mr.
7 Yadan testified about Facebook's proprietary facial-recognition technology, its network
8 architecture and the way in which Facebook's systems interact with and support Facebook's
9 facial-recognition technology. *See* Nadolenco Sealing Decl. ¶ 18. Mr. Taigman and Mr. Yadan
10 further testified concerning how Facebook applies its facial-recognition technology to
11 photographs uploaded to Facebook. *Id.* This information has been designated "Highly
12 Confidential – Attorneys' Eyes Only" in accordance with the Protective Order and has not been
13 disclosed to third parties. *Id.* The disclosure of this information would cause competitive harm
14 to Facebook by providing direct insight into highly confidential, proprietary, and competitively
15 sensitive aspects of Facebook's proprietary technology and its internal business processes and
16 strategies. Yadan Decl. ¶ 34; Nadolenco Sealing Decl. at ¶ 19. Public release of this information
17 would cause Facebook harm by providing competitors—particularly those who also use facial
18 recognition—with insight into how Facebook designs its computer systems and its proprietary
19 facial-recognition technology. Yadan Decl. ¶ 34; Nadolenco Sealing Decl. at ¶ 19. Further,
20 public disclosure of information related to the details of Facebook's network architecture could
21 put Facebook and the people who use Facebook at increased risk of cyber attack by malicious
22 actors. Yadan Decl. ¶ 34; Nadolenco Sealing Decl. at ¶ 19. Accordingly, the Court should seal
23 the relevant portions of the Taigman and Yadan deposition transcripts filed in connection with
24 Facebook's motion for summary judgment.

1 **4. Portions Of Facebook’s Motion For Summary Judgment And**
 2 **Supplemental Brief**

3 In accordance with Local Rule 79-5, Facebook has narrowly redacted portions of its
 4 motion for summary judgment and its supplemental brief in support of its motion for summary
 5 judgment in *Gullen v. Facebook, Inc.* that reference or quote from confidential information
 6 contained in the Yadan Declaration, the exhibits thereto, and the deposition testimony that
 7 Facebook seeks to maintain under seal (discussed above at A.1-3). Nadolenco Sealing Decl. ¶¶
 8 22-23.

9 **B. Plaintiffs’ Opposition To Facebook’s Motion For Summary Judgment**

10 **1. Certain Exhibits To Plaintiffs’ Opposition**

11 Facebook seeks to seal Exhibits 2, 6 through 8, 10, 12, 13, 15, 17, and 22 through 28, or
 12 portions thereof, to the *Facebook Biometric* and *Gullen* plaintiffs’ combined opposition to
 13 Facebook’s motion for summary judgment. These exhibits are copies of Facebook business
 14 records that discuss: (i) how Facebook’s proprietary facial-recognition technology works and the
 15 way in which Facebook’s computer systems interact with and support Facebook’s facial-
 16 recognition technology (Exhibits 2, 6, 27); (ii) confidential information regarding Facebook’s
 17 business rules for creating, modifying, and deleting data associated with facial-recognition
 18 (Exhibits 7, 8); (iii) confidential details about Facebook’s strategic plan for the Tag Suggestions
 19 feature (Exhibit 10, 12, 13, 22, 26, 28); (iv) confidential details about a potential application of
 20 facial-recognition technology that is not publicly known (Exhibit 15); (v) communications with
 21 government entities concerning its facial-recognition technology, which are maintained as
 22 confidential by both sides to the communication (Exhibits 17); (vi) confidential details regarding
 23 Tag Suggestions privacy decisions (Exhibit 23); (vii) confidential information regarding product
 24 launch strategies (Exhibits 24, 25). Nadolenco Sealing Decl. ¶ 11. Each of these documents has
 25 been produced by Facebook in this litigation and designated as “Confidential” or “Highly
 26 Confidential – Attorneys’ Eyes Only” pursuant to the Protective Order. *Id.*

1 Facebook's good cause to seal these records is detailed in paragraph 34 of the Yadan
2 Declaration, namely, that public release of this information would cause Facebook harm by
3 providing competitors with insight into how Facebook designs its computer systems and its
4 proprietary facial-recognition technology. *See* Yadan Decl. ¶ 34.

5 **2. Excerpts From The Taigman, Yadan, Sherman, and Barak**
6 **Depositions**

7 The Court should seal the relevant portions of the Taigman and Yadan deposition
8 transcripts (Exhibits 3 and 4) for the reasons described above at A.3. The Court should also seal
9 the attached excerpts from the deposition transcripts of Facebook witnesses Robert Sherman and
10 Dan Barak (Exhibits 5 and 11) for similar reasons. Like Mr. Taigman and Mr. Yadan, Mr.
11 Sherman and Mr. Barak also testified about Facebook's proprietary facial-recognition
12 technology, its network architecture and the way in which Facebook's systems interact with and
13 support Facebook's facial-recognition technology. *See* Nadolenco Sealing Decl. ¶ 18. Mr.
14 Sherman and Mr. Barak further testified concerning how Facebook applies its facial-recognition
15 technology to photographs uploaded to Facebook. *Id.* This information has been designated
16 "Highly Confidential – Attorneys' Eyes Only" in accordance with the Protective Order and has
17 not been disclosed to third parties. *Id.* The disclosure of this information would cause
18 competitive harm to Facebook by providing direct insight into highly confidential, proprietary,
19 and competitively sensitive aspects of Facebook's proprietary technology and its internal
20 business processes and strategies. Yadan Decl. ¶ 34; Nadolenco Sealing Decl. at ¶ 19. Public
21 release of this information would cause Facebook harm by providing competitors—particularly
22 those who also use facial recognition—with insight into how Facebook designs its computer
23 systems and its proprietary facial-recognition technology. Yadan Decl. ¶ 34; Nadolenco Sealing
24 Decl. at ¶ 19. Further, public disclosure of information related to the details of Facebook's
25 network architecture could put Facebook and the people who use Facebook at increased risk of
26 cyber attack by malicious actors. Yadan Decl. ¶ 34; Nadolenco Sealing Decl. at ¶ 19.

Accordingly, the Court should seal the relevant portions of the Sherman and Barak deposition transcripts filed in connection with Facebook's motion for summary judgment.

3. Portions Of The Hall And Milian Declarations

In accordance with Local Rule 79-5, Facebook has redacted narrow portions of the declarations of David W. Hall and David P. Milian (Exhibits 29 and 30). The redacted portions of these declarations reference or quote information contained in the portions of the deposition transcript of Omry Yadan that Facebook seeks to seal, and should be sealed for the same reasons. Nadolenco Sealing Decl. ¶¶ 22-23.

4. Portions Of Plaintiffs' Opposition

Facebook also has narrowly redacted certain portions of plaintiffs' opposition to Facebook's motion for summary judgment that reference or quote from confidential information contained in the exhibits, deposition testimony, and declarations that Facebook seeks to maintain under seal (discussed above at B.1-3). Nadolenco Sealing Decl. ¶¶ 22-23.

C. Facebook's Reply In Support Of Its Motion For Summary Judgment

1. Certain Exhibits To Facebook's Reply

Facebook seeks to seal portions of Exhibit 1 to the declaration of Matthew Provance in support of Facebook's motion for summary judgment ("Provance MSJ Declaration"). Exhibit 1 is a copy of a Facebook business record that discusses information about how Facebook's proprietary facial-recognition technology works that is not disclosed to the public and has been produced by Facebook in this litigation and designated as "Highly Confidential – Attorneys' Eyes Only" pursuant to the Protective Order. Nadolenco Sealing Decl. ¶ 11. Facebook's compelling reason to seal this record is detailed in paragraph 34 of the Yadan Declaration, namely, that public release of this information would cause Facebook harm by providing competitors with insight into how Facebook designs its computer systems and its proprietary facial-recognition technology. *See* Yadan Decl. ¶ 34.

2. Expert Report Of Dr. Atif Hashmi

The December 22, 2017 report submitted by plaintiffs' expert Dr. Atif Hashmi (Exhibit 2 to the Provance MSJ Declaration) contains a detailed analysis of source code relating to Facebook's facial-recognition technology, which Facebook has designated as "Confidential," "Highly Confidential – Attorneys' Eyes Only," or "Highly Confidential – Source Code" pursuant to the Protective Order. Nadolenco Sealing Decl. ¶ 20. Its public release would cause Facebook harm by providing competitors—particularly those who also use facial recognition—with insight into how Facebook designs its computer systems and its proprietary facial-recognition technology. *See* Yadan Decl. ¶ 34. Further, public disclosure of information related to Facebook's network architecture and how its architecture is used in connection with facial recognition could put Facebook and the people who use Facebook at increased risk of cyber attack by malicious actors. *Id.* For these reasons, among others, Facebook takes steps to ensure that the information set forth in Dr. Hashmi's expert report is not disclosed to competitors or otherwise made publicly known. *Id.*

3. Excerpts From The Taigman And Yadan Depositions

The Court should seal portions of the Taigman and Yadan deposition transcripts (Exhibits 3 and 4 to the Provance MSJ Declaration) for the reasons described above at A.3.

4. Portions Of Facebook's Reply Brief

In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of its reply brief that reference or quote from confidential information contained in the exhibits, expert report, and excerpts of deposition testimony that Facebook seeks to maintain under seal (discussed above at C.1-3). Nadolenco Sealing Decl. ¶¶ 22-23.

D. Consolidated Plaintiffs' Motion For Class Certification

1. Certain Exhibits To Plaintiffs' Motion

Exhibits 3, 6-9, 11, 17, and 20 to plaintiffs' motion for class certification are identical to the following summary judgment exhibits, which are discussed above at B.1:

- 1 • Exhibit 3 is identical to Exhibit 2 to plaintiffs' opposition to Facebook's motion
- 2 for summary judgment;
- 3 • Exhibit 6 is identical to Exhibit 6 to plaintiffs' opposition to Facebook's motion
- 4 for summary judgment;
- 5 • Exhibit 7 is identical to Exhibit 7 to plaintiffs' opposition to Facebook's motion
- 6 for summary judgment;
- 7 • Exhibit 8 is identical to Exhibit 26 to plaintiffs' opposition to Facebook's motion
- 8 for summary judgment;
- 9 • Exhibit 9 is identical to Exhibit 8 to plaintiffs' opposition to Facebook's motion
- 10 for summary judgment;
- 11 • Exhibit 11 is identical to Exhibit 10 to plaintiffs' opposition to Facebook's motion
- 12 for summary judgment;
- 13 • Exhibit 17 is identical to Exhibit 22 to plaintiffs' opposition to Facebook's motion
- 14 for summary judgment; and
- 15 • Exhibit 20 is identical to Exhibit 23 to plaintiffs' opposition to Facebook's motion
- 16 for summary judgment.

17 Exhibit 19 to plaintiffs' motion is a summary of information related to photos uploaded to
 18 Facebook by plaintiff Carlo Licata, which identifies, among other things: (i) plaintiff Licata's
 19 personal email and home telephone number; and (ii) IP address information and other
 20 information associated with Licata's Facebook user activity. Facebook considers this
 21 information about its users to be non-public and takes steps to prevent the information from
 22 becoming publicly available or available to people outside of Facebook. Yadan Decl. ¶ 29.

23 Exhibits 12 and 21-24 to plaintiffs' motion are copies of Facebook business records that
 24 discuss: (i) communications with government entities concerning its facial-recognition
 25 technology, which are maintained as confidential by both sides to the communication (Exhibits
 26 12, 22); (ii) confidential information regarding product launch strategies (Exhibit 21); and (iii)

1 confidential plans for potential future uses of facial-recognition technology that are not publicly
 2 known and have not been announced (Exhibits 23, 24). Nadolenco Sealing Decl. ¶ 11. Each of
 3 these documents has been produced by Facebook in this litigation and designated as
 4 “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” pursuant to the Protective
 5 Order. *Id.*

6 Good cause to seal these records is detailed in paragraph 34 of the Yadan Declaration,
 7 namely, that public release of this information would cause Facebook harm by providing
 8 competitors with insight into how Facebook designs its computer systems and its proprietary
 9 facial-recognition technology. *See* Yadan Decl. ¶ 34.

10 **2. Excerpts From The Taigman, Yadan, And Sherman Depositions**

11 The Court should seal the relevant portions of the Yadan, Taigman, and Sherman
 12 deposition transcripts (Exhibits 2, 4, 5) for the reasons described above at A.3 and B.3.

13 **3. Portions Of Plaintiffs’ Motion**

14 In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of
 15 consolidated plaintiffs’ motion for class certification that reference or quote from confidential
 16 information contained in the exhibits and deposition testimony that Facebook seeks to maintain
 17 under seal (discussed above at D.1-2). Nadolenco Sealing Decl. ¶¶ 22-23.

18 **E. Plaintiff Gullen’s Motion For Class Certification**

19 **1. Certain Exhibits To Plaintiff Gullen’s Motion**

20 Exhibit 1 to plaintiff Gullen’s motion reflects a prior version of Facebook’s Help Center
 21 page, which was publicly available. Facebook does not seek to maintain this portion of the
 22 document under seal. However, Exhibit 1 also appends one page from a different document
 23 produced by Facebook during discovery (FBBIPA_00009275-79), which reflects an internal
 24 strategy document prepared by Face.com, a facial-recognition technology company that
 25 Facebook acquired in 2012. Nadolenco Sealing Decl. ¶ 11. This document reflects confidential
 26 information and, moreover, it appears to have been appended to Exhibit 1 inadvertently and
 27

1 therefore has no bearing on the issues to be decided on plaintiff's class certification motion. *See*
 2 *CreAgri*, 2014 WL 27028, at *2 (granting motion to seal portion of document that would "not
 3 further the public's understanding of the reasoning underlying the Court's decisions"). Facebook
 4 previously submitted (*Gullen* Dkt. 117-1) a replacement version of Exhibit 1—containing just
 5 the Help Center document—that may be filed publicly.

6 Exhibits 3 and 5 to plaintiff *Gullen*'s motion are copies of Facebook business records that
 7 discuss: (i) how Facebook's proprietary facial-recognition technology works (Exhibit 3); and (ii)
 8 confidential details of an internal product launch strategy (Exhibit 5). *Nadolenco Sealing Decl.*
 9 ¶ 11. Each document was produced by Facebook and designated as "Confidential" or "Highly
 10 Confidential – Attorneys' Eyes Only" pursuant to the Protective Order. *Id.*

11 Facebook's good cause to seal these records is detailed in paragraph 34 of the *Yadan*
 12 Declaration, namely, that public release of this information would cause Facebook harm by
 13 providing competitors with insight into how Facebook designs its computer systems and its
 14 proprietary facial-recognition technology. *See Yadan Decl.* ¶ 34.

15 **2. Excerpts From The Taigman Deposition**

16 The Court should seal the relevant portions of the Taigman deposition transcript
 17 (Exhibit 2) for the reasons described above at A.3. Further, *plaintiff's motion for class*
 18 *certification attaches a full 364 pages of Mr. Taigman's deposition transcript, but cites the*
 19 *transcript only once*, referencing just over one page's worth of testimony. As a result, more than
 20 99 percent of Mr. Taigman's testimony has no bearing on the issues to be decided in plaintiff's
 21 class certification motion and should be sealed for this additional reason. *See CreAgri, Inc.*,
 22 2014 WL 27028, at *2 (granting motion to seal portion of document that would "not further the
 23 public's understanding of the reasoning underlying the Court's decisions"). Rather than redact
 24 confidential information from the 364-page transcript, Facebook previously filed (*Gullen* Dkt.
 25 117-3) an alternative version of Exhibit 2 to be filed under seal in its entirety, which contains
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 27
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only the cover page and the single page of the “minuscrit” cited by plaintiff. If the Court prefers a redacted version of the entire transcript, Facebook will submit one.

3. Portions Of Plaintiff Gullen’s Motion

In accordance with Local Rule 79-5(d)(1), Facebook has narrowly redacted certain portions of plaintiff Gullen’s motion for class certification that reference or quote from confidential information contained in the exhibits and deposition testimony of Yaniv Taigman that Facebook seeks to maintain under seal (discussed above at E.1-2).³ Nadolenco Sealing Decl. ¶¶ 22-23.

F. Facebook’s Opposition To Consolidated Plaintiffs’ Motion For Class Certification

1. Portions Of Facebook’s Declarations

The Court should seal the designated portions of the January 25, 2018 Declaration of Omry Yadan (“2d Yadan Declaration”), the Declaration of Benjamin Strahs, and the Declaration of Qizhen Ruan submitted with Facebook’s opposition. The designated portions of the 2d Yadan Declaration contain information relating to the details of Facebook’s network architecture and its facial-recognition technology, which Facebook has designated as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” pursuant to the Protective Order. Nadolenco Sealing Decl. ¶ 15. Facebook maintains the details of how its facial-recognition technology works as a trade secret, particularly the details described in the 2d Yadan Declaration concerning the percentage of faces in uploaded photos that are detected and the percentage of detected faces that are “recognizable.” 2d Yadan Decl. ¶ 13. Public release of this information would cause Facebook harm by providing competitors—particularly those who also use facial recognition—with insight

³ Facebook also has redacted a portion of the footnote located on page 5 of Mr. Gullen’s motion, at lines 19-23, which references an “Exhibit 6” that was not attached to the motion. The footnote appears to reference a document that has been attached to the consolidated plaintiffs’ motion for class certification as Exhibit 21. (*See Facebook Biometric* Dkt. 254-24.) Facebook has requested sealing of that document in its entirety for the reasons described above at D.1. For the same reasons, Facebook requests that the redacted portions of Mr. Gullen’s motion that reference the confidential information contained in that exhibit also remain under seal.

1 into Facebook's proprietary facial-recognition technology. *Id.* Facebook takes steps to ensure
 2 that such information is not disclosed to competitors or otherwise made publicly known. *Id.*
 3 Thus, the requested portions of the Yadan Declaration should be maintained under seal.

4 The designated portion of the Strahs Declaration should be sealed because it references
 5 and discusses the information contained in Exhibit 1 thereto, which Facebook seeks to seal
 6 because it contains confidential information related the *Facebook Biometric* plaintiffs' privacy
 7 settings. Nadolenco Sealing Decl. ¶ 14. Facebook considers this information about its users to
 8 be non-public and takes steps to prevent the information from becoming publicly available or
 9 available to people outside of Facebook. Yadan Decl. ¶ 29.

10 The designated portion of the Ruan Declaration contains confidential information related
 11 to the proprietary dataset by which Facebook can assign a geographic region to many IP
 12 addresses. Nadolenco Sealing Decl. ¶ 16. Facebook's good cause to seal these records is
 13 detailed in paragraph 34 of the Yadan Declaration, namely, that public release of this information
 14 would cause Facebook harm by providing competitors with insight into how Facebook designs
 15 its computer systems and its proprietary facial-recognition technology. *See* Yadan Decl. ¶ 34.

16 **2. Certain Exhibits To Facebook's Opposition**

17 Exhibits 3 and 4 to the Declaration of Omry Yadan in support of Facebook's opposition
 18 to plaintiffs' motion for class certification ("2d Yadan Declaration") are identical to the
 19 following summary judgment exhibits, which are discussed above at A.2:

- 20 • Exhibit 3 to the 2d Yadan Declaration is identical to Exhibit 6 to the Yadan
 21 Declaration in support of Facebook's motion for summary judgment; and
- 22 • Exhibit 4 to the 2d Yadan Declaration is identical to Exhibit 2 to the Yadan
 23 Declaration in support of Facebook's motion for summary judgment.

24 Exhibit 1 to the Declaration of John Nadolenco in support of Facebook's opposition to
 25 plaintiffs' motion for class certification ("Nadolenco Class Cert. Declaration") is a copy of the
 26
 27

Yadan Declaration in support of Facebook’s motion for summary judgment, which is discussed above at A.1.

Exhibit 1 to the Strahs Declaration is a copy of a Facebook business record that reflects the *Facebook Biometric* plaintiffs’ privacy settings associated with their Facebook accounts. Nadolenco Sealing Decl. ¶ 14. Facebook considers this information about its users to be non-public and takes steps to prevent the information from becoming publicly available or available to people outside of Facebook. Yadan Decl. ¶ 29.

Exhibits 1 and 2 to the 2d Yadan Declaration are copies of Facebook business records that reflect: (i) confidential details concerning the percentage of faces in uploaded photos that are detected and the percentage of detected faces that are “recognizable” (Exhibit 1 to 2d Yadan Declaration); and (ii) confidential details regarding the nature of the templates associated with Facebook’s facial-recognition technology (Exhibit 2 to 2d Yadan Declaration). 2d Yadan Decl. ¶ 13; Nadolenco Sealing Decl. ¶¶ 11, 15. Each of these documents has been produced by Facebook in this litigation and designated as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” pursuant to the Protective Order. *Id.* Facebook’s good cause to seal these records is detailed in paragraph 34 of the Yadan Declaration, namely, that public release of this information would cause Facebook harm by providing competitors with insight into how Facebook designs its computer systems and its proprietary facial-recognition technology. *See* Yadan Decl. ¶ 34.

3. Excerpts From The Yadan And Taigman Deposition Transcripts

The Court should seal the relevant portions of the Yadan and Taigman deposition transcripts (Exhibits 2 and 3 to the Nadolenco Class Cert. Declaration) for the reasons described above at A.3.

4. Expert Report Of Dr. Matthew Turk

The Court should seal the December 22, 2017 report submitted by Facebook’s expert Dr. Matthew Turk (Exhibit 4 to the Nadolenco Class Cert. Declaration) because it contains a detailed analysis of Facebook source code and other internal documents relating to Facebook’s facial-

1 recognition technology, which Facebook has designated as “Confidential,” “Highly Confidential
 2 – Attorneys’ Eyes Only,” or “Highly Confidential – Source Code” pursuant to the Protective
 3 Order. Nadolenco Sealing Decl. ¶¶ 20. Its public release would cause Facebook harm by
 4 providing competitors—particularly those who also use facial recognition—with insight into
 5 how Facebook designs its computer systems and its proprietary facial-recognition technology.
 6 *See Yadan Decl.* ¶ 34. Further, public disclosure of information related to Facebook’s network
 7 architecture and how its architecture is used in connection with facial recognition could put
 8 Facebook and the people who use Facebook at increased risk of cyber attack by malicious actors.
 9 *Id.* For these reasons, among others, Facebook takes steps to ensure that the information set
 10 forth in Dr. Turk’s expert report is not disclosed to competitors or otherwise made publicly
 11 known. *Id.*

12 **5. Portions Of Facebook’s Discovery Responses**

13 The Court should seal the designated portions of Facebook’s Amended and Supplemental
 14 Response to Plaintiffs’ Second Set of Interrogatories (Exhibit 5 to the Nadolenco Class Cert.
 15 Declaration), which contain information relating to the details of Facebook’s technological
 16 capabilities to determine IP-address information associated with photographs uploaded to
 17 Facebook, and its ability to associate those IP-addresses with geographic locations. Nadolenco
 18 Sealing Decl. ¶ 21. Facebook’s good cause to seal these records is detailed in paragraph 34 of
 19 the Yadan Declaration, namely, that public release of this information would cause Facebook
 20 harm by providing competitors with insight into location capabilities and how Facebook designs
 21 its computer systems and its proprietary facial-recognition technology. *See Yadan Decl.* ¶ 34.

22 **6. Portions Of Facebook’s Opposition**

23 In accordance with Local Rule 79-5(d)(1), Facebook has narrowly redacted certain
 24 portions of its opposition to the consolidated plaintiffs’ motion for class certification that
 25 reference or quote from confidential information contained in the declarations, exhibits,
 26
 27

1 deposition transcripts, expert report, and discovery responses that Facebook seeks to maintain
2 under seal (discussed above at F.1-5). Nadolenco Sealing Decl. ¶¶ 22-23.

3 **G. Facebook’s Opposition To Plaintiff Gullen’s Motion For Class Certification**

4 In accordance with Local Rule 79-5(d)(1), Facebook has narrowly redacted certain
5 portions of its opposition to Mr. Gullen’s motion for class certification that reference or quote
6 from confidential information contained in the Yadan Declarations and the exhibits Facebook
7 seeks to maintain under seal (discussed above at D.1, E.1, and F.1-2).

8 **H. Consolidated Plaintiffs’ Reply In Support Of Their Motion For Class**
9 **Certification**

10 **1. Excerpts From The Taigman Deposition**

11 The Court should seal the relevant portions of the Taigman deposition transcript (Exhibit
12 4) for the reasons described above at A.3.

13 **2. Expert Report of Jeffrey Dunn**

14 The Court should seal the February 2, 2017 report submitted by plaintiffs’ expert Jeffrey
15 Dunn (Exhibit 5) because it contains a detailed analysis of Facebook’s facial-recognition
16 technology, the underlying sources for which Facebook has designated as “Confidential,”
17 “Highly Confidential – Attorneys’ Eyes Only,” or “Highly Confidential – Source Code” pursuant
18 to the Protective Order. Nadolenco Sealing Decl. ¶ 20. Its public release would cause Facebook
19 harm by providing competitors—particularly those who also use facial recognition—with insight
20 into how Facebook designs its computer systems and its proprietary facial-recognition
21 technology. *See* Yadan Decl. ¶ 34. Further, public disclosure of information related to
22 Facebook’s network architecture and how its architecture is used in connection with facial
23 recognition could put Facebook and the people who use Facebook at increased risk of cyber
24 attack by malicious actors. *Id.* For these reasons, among others, Facebook takes steps to ensure
25 that the information set forth in the Dunn Rebuttal Expert Report is not disclosed to competitors
26 or otherwise made publicly known. *Id.*

27 **3. Portions Of Consolidated Plaintiffs’ Reply**

1 In accordance with Local Rule 79-5(d)(1), Facebook has narrowly redacted certain
 2 portions of consolidated plaintiffs' reply that reference or quote from confidential information
 3 contained in the exhibits Facebook seeks to seal, the deposition testimony of Omry Yadan, and
 4 the confidential information in the Declaration of Benjamin Strahs (discussed above at F.1-3).
 5 Nadolenco Sealing Decl. ¶¶ 22-23.

6 **I. Plaintiff Gullen's Reply In Support Of His Motion For Class Certification**

7 Mr. Gullen's reply in support of his motion for class certification initially was filed
 8 publicly, without redacting references to discovery material produced by Facebook on a
 9 "Confidential" and "Highly Confidential – Attorney's Eyes Only" basis (*Gullen* Dkt. 136). Mr.
 10 Gullen subsequently filed a noticed of errata and a redacted copy of his reply (*Gullen* Dkt. 138,
 11 139). Facebook respectfully asks that the Court seal the unredacted version that is currently
 12 available on the public docket. The redactions in the subsequent copy reflect confidential
 13 information contained in the class certification exhibits that Facebook seeks to seal, including the
 14 confidential deposition testimony of Omry Yadan and Yaniv Taigman (discussed above at F.2-
 15 3). Nadolenco Sealing Decl. ¶¶ 22-23. Public release of this information would cause Facebook
 16 harm by providing competitors with insight into how Facebook designs its computer systems and
 17 its proprietary facial-recognition technology. *See* Yadan Decl. ¶ 34; Nadolenco Sealing Decl.
 18 ¶¶ 11, 19.

19 **J. Plaintiff Gullen's Motion For Leave To File A First Amended Complaint**

20 **1. Exhibit F To Plaintiff Gullen's Motion**

21 Exhibit F to Mr. Gullen's motion is identical to Exhibit 2 to plaintiffs' opposition to
 22 Facebook's motion for summary judgment, described above at B.1.

23 **2. Excerpts From The Taigman And Yadan Depositions**

24 The Court should seal portions of the Taigman and Yadan deposition transcripts
 25 (Exhibits E and H) for the reasons described above at A.3.

3. Portions Of Plaintiff Gullen's Motion

In accordance with Local Rule 79-5(d)(1), Facebook has narrowly redacted certain portions of plaintiff Gullen's motion that reference or discuss confidential information contained in the Yadan Declaration, Exhibit F, and the deposition testimony of Omry Yadan and Yaniv Taigman that Facebook seeks to maintain under seal (discussed above at J.1-2). Nadolenco Sealing Decl. ¶¶ 22-23.

K. Facebook's Opposition To Plaintiff Gullen's Motion For Leave To File A First Amended Complaint

1. Portions Of The Yadan Declaration

Exhibit 6 to the Declaration of Matthew Provance in Support of Facebook's Opposition to Plaintiff's Motion for Leave ("Provance Leave Declaration") is a copy of the Yadan Declaration in Support of Facebook's Motion for Summary Judgment, along with Exhibit 2 thereto, portions of which should be sealed for the reasons discussed above at A.1-2.

2. Excerpts From The Taigman And Yadan Depositions

The Court should seal confidential portions of the Taigman and Yadan deposition transcripts (Exhibits 1 and 5 to the Provance Leave Declaration) for the reasons described above at A.3.

3. Portions Of Facebook's Opposition

In accordance with Local Rule 79-5(d)(1), Facebook has redacted certain portions of its opposition to Mr. Gullen's motion for leave to file a first amended complaint. The redacted portions of the motion reference or quote from confidential information contained in the materials identified above that Facebook seeks to maintain under seal. Nadolenco Sealing Decl. ¶¶ 22-23.

L. Portions Of Mr. Gullen's Reply In Support Of His Motion For Leave To File A First Amended Complaint

Mr. Gullen's reply in support of his motion for leave to file a first amended complaint initially was filed publicly (*Gullen* Dkt. 137), without redacting references to discovery material produced by Facebook on a "Confidential" and "Highly Confidential – Attorney's Eyes Only"

1 basis. Mr. Gullen subsequently filed a noticed of errata containing a redacted copy of Mr.
 2 Gullen's reply (*Gullen* Dkt. 138, 139). Facebook respectfully asks that the Court seal the
 3 unredacted version that is currently available on the public docket. The redactions in the
 4 subsequent copy reflect information contained in the exhibits to Mr. Gullen's motion that
 5 Facebook seeks to maintain under seal, including the confidential deposition testimony of Omry
 6 Yadan and Yaniv Taigman (discussed above at J.1-2). Nadolenco Sealing Decl. ¶¶ 22-23.
 7 Public release of this information would cause Facebook harm by providing competitors with
 8 insight into how Facebook designs its computer systems and its proprietary facial-recognition
 9 technology. *See* Yadan Decl. ¶ 34; Nadolenco Sealing Decl. ¶¶ 11, 19.

10 **M. Exhibits That May Be Unsealed**

11 Facebook does not seek to maintain under seal any of the following documents filed by
 12 plaintiffs provisionally under seal in accordance with Local Rule 79-5(e):

- 13 • Exhibits 1, 13-16, or 18 to plaintiffs' motion for class certification; and
- 14 • Exhibits 1, 9, 14, 16, or 18-21 to plaintiffs' opposition to Facebook's motion for
 15 summary judgment; and
- 16 • Exhibits G and I to plaintiff Gullen's motion for leave to file a first amended class
 17 action complaint.

18 Similarly, Facebook understands that plaintiffs do not seek to maintain under seal any of
 19 the following documents filed by Facebook provisionally under seal in accordance with Local
 20 Rule 79-5(e):

- 21 • Exhibits 2, 3, and 4 to Facebook's reply in support of its renewed motion to
 22 dismiss;
- 23 • Redacted portions of Facebook's reply in support of its renewed motion to
 24 dismiss;
- 25 • Exhibit 7 to Facebook's motion for summary judgment;

- Exhibits 8, 9, 10, and 14 to the declaration of John Nadolenco in support of Facebook's opposition to plaintiffs' motion for class certification; and
- Exhibit 2 to the declaration of Matthew Provance in support of Facebook's opposition to plaintiff's motion for leave to amend.

III. CONCLUSION

Facebook respectfully requests that the Court grant its unopposed motion.

Dated: February 23, 2018

MAYER BROWN LLP

By: /s/ John Nadolenco
John Nadolenco
Lauren R. Goldman

Counsel for Defendant Facebook, Inc.